

Supreme Court, U. S.  
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1841

GREAT LAKES DREDGE & DOCK COMPANY,  
*Petitioner,*

—against—

DEPARTMENT OF TAXATION AND FINANCE  
OF THE STATE OF NEW YORK,

*Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals  
of the State of New York

REPLY BRIEF OF PETITIONER

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**Statement**

This brief is made in reply to the brief of the Department of Taxation and Finance of the State of New York opposing petitioner's application for a writ of certiorari

to the Court of Appeals of the State of New York in the instant case. As its view of the applicable "Question Involved", Respondent states:

"Does the petitioner raise a substantial Federal question in compliance with the jurisdictional requirements of 28 U.S.C. Section 1257?"

In its argument (set forth in respondent's brief at page 4), it is argued that neither the Appellate Division of the New York Supreme Court nor the Court of Appeals had before it a constitutional challenge to the imposition of New York's compensating use tax to certain vessels and supplies used in the activity of dredging highways of interstate commerce.

This brief deals with the constitutional consideration of the issues involved by the New York courts.

## ARGUMENT

The implications of the constitutional difficulties inherent in the proceedings were fully before the New York courts. The action of the Court of Appeals of the State of New York explicitly denied effect to such constitutional considerations and is, therefore, erroneous and invalid.

It is quite true that Petitioner did not urge to the Appellate Division of the State of New York that Section 1115 (a) (8) of the New York Tax Law was unconstitutional. Petitioner did not so urge, for the very simple reason that it did not believe such section to be unconstitutional—nor does it claim so here. Petitioner simply argues that the effect given an otherwise constitutional statute by the decision of the Court of Appeals created

constitutional impediments which render the application (though not the language) of the statute constitutionally unsound.

Since the Respondent has seen fit to raise a question as to the adequacy of Petitioner's submission to the Appellate Division, we are quoting herein from Petitioner's brief in the Appellate Division and also from Respondent's brief in opposition thereto. The quoted excerpt from Respondent's brief below should, as well be seen, be conclusive as to Respondent's present argument.

In pointing out how Section 1115 (a) (8), avoided constitutional difficulties, Petitioner had commended the Legislature of the State of New York for its knowledgeable and far sighted solution to what might otherwise be difficult problems in the field of interstate commerce.

"It must be presumed that the New York Legislature was not unaware of the problems posed by the 'taxable moment' theory to vessels engaged in interstate commerce. For example, it was apparent to the legislators that a vessel engaged in interstate commerce may spend 'taxable moments' in many different taxing locales—and thus be subject to, *at least*, the potential of multiple taxation.

Some states have, in recognizing the inequity of afflicting commercial property with duplicative taxation, given credit use taxes paid elsewhere (cf. *Henneford v. Silas Mason Co.*, 1936, 300 U.S. 577, 587).

Another approach might be to apportion the time spent productively by income-producing property among the various taxing locales. But this too leads to other problems (cf. *Southern Pacific Co. v. Gallagher*, 1938, 306 U.S. 167).

A reading of New York's solution, New York Tax Law Section 1115(a) (8), discloses that this state's legislature determined to cut the Gordian knot altogether—at least in the case of vessels engaged in interstate commerce." (Petitioner's Brief to the Appellate Division at pages 5-6).

If we were to grant credence to the claim now being made by the New York Department of Taxation and Finance that the constitutional implications of Section 1115 (a) (8) were not adequately before the Courts below, we would find anomalous indeed the following submission of issue to the Appellate Division made by this very same New York State Department of Taxation and Finance.

In Respondent's brief to the Appellate Division there appears (on page 22 thereof) the following point made by Respondent by way of opposition to Petitioner in that court.

#### "POINT II

THE APPLICATION OF THE SALES AND USE TAX TO PETITIONER'S EQUIPMENT IS NOT PROHIBITED BY THE INTERSTATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION." (RESPONDENT'S BRIEF TO THE APPELLATE DIVISION)

There follows a consideration of the New York Court of Appeals decision in *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 NY 2d 1, wherein the Court of Appeals of the State of New York professed to dispose of constitutional impairments to the levying of a tax upon dredging equipment before the effective date of Section 1115(a) (8).

We may then ask the question: If the constitutional implications of a denial of effect to the plain provisions

of Section 1115(a) (8) were not clearly before the court, then to what issue was the Department of Taxation and Finance addressing itself in the point quoted above?

Perhaps the simplest verification of the presence of constitutional issues at all levels in these proceedings is to be found in the language of the Court of Appeals itself.

In disposing of petitioner's arguments and in reversing the contrary decision of the Appellate Division the Court of Appeals took pains to point out:

"Preliminarily, it should be made clear that where there is no evidence, and indeed there is none here, that any other jurisdiction has imposed a sales or use tax on the items sought to be taxed, no constitutional problem of burdening interstate commerce by multiple taxation confronts us (*Matter of Atlantic Gulf & Pacific Co. v. Gerosa*, 16 NY 2d 1, app dsmd, 382 U.S. 368; see *Southern Pacific Co. v. Gallagher*, 306 U.S. 167; cf U.S. Const, art I, §8)." (Appendix to Petitioner's Brief p. 3a)

The only explanation for this holding by the Court of Appeals—at least the only explanation consistent with the position now taken by the Department of Taxation and Finance—is that the Court of Appeals perceived the constitutional problem and passed upon it *sua sponte*.

That the Court of Appeals gratuitously introduced a concept not present in the controversy between the parties seems scarcely likely. However, it is essentially immaterial whether the Court of Appeals raised the issue on its own in reversing a holder in favor of constitutional interpretation of the exempting statute or whether the Court of Appeals recognized the constitutional problems latent in the holding it was about to make. The point is that the

nature of the controversy was such as to necessarily involve constitutional difficulties—if, and only if, such entities as petitioner were excised from the coverage of a statute which appears to be clear on its face.

In summary, therefore, Petitioner, though pressing the constitutional validity of the exempting statute (Section 1115 (a) (8)), clearly pointed out the constitutional difficulties which would be present were the statute not made applicable to Petitioner. In response, Respondent denied those constitutional difficulties and thus the issue was joined before the Appellate Division. The Appellate Division avoided constitutional problems by holding that the reach of the exempting statute was exactly what it said. The Court of Appeals created constitutional infirmities by denying proper effect to the constitutionally proper exempting statute.

Petitioner has elaborated in some detail in its main brief exactly what the constitutional problems involved herein were. Both sides and the Courts which have passed upon the issues herein were fully aware of what the results of the present ruling would be—in a constitutional context.

## CONCLUSION

**The petition for writ of certiorari should be granted.**

Respectfully submitted,

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